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No. 88-2018

In the Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF ILLINOIS, PETITIONER

v.

EDWARD RODRIGUEZ

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

The United States will address the following question:

Whether the warrantless entry of a dwelling is justified under the Fourth Amendment when law enforcement officers reasonably, but mistakenly, believe that the person who permits the entry has authority to do so.

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INTEREST OF THE UNITED STATES

This case presents the question whether the warrantless entry of a dwelling is justified under the Fourth Amendment when law enforcement officers reasonably, but mistakenly, believe that the person who permits the entry has authority to do so. Federal agents frequently undertake searches in reliance on the consent of persons who appear to have authority to consent to the search. Even though the agents may reasonably believe that the search was properly supported by consent, that belief sometimes turns out to be wrong in light of facts that subsequently emerge. Because the Court's decision will govern the admissibility of evidence gathered in such instances, the United States has a significant law enforcement interest in this case.

STATEMENT

1. On July 26, 1985, at 2:30 p.m., Chicago, Illinois, police officers James Entress and Ricky Gutierrez went to a home at 3554 South Wolcott in Chicago in response to a call from another officer. At the home, the officers met Gail Fischer and her mother. Fischer had a black eye, bruises on her neck, and a swollen jaw. Fischer told the officers that earlier that day respondent had beaten her at their apartment at 3519 South California Street in Chicago. Fischer also said that respondent had for a time refused to let her leave the apartment. Entress asked Fischer whether she wished to sign a complaint against respondent. After briefly hesitating, Fischer said that she did. Fischer said that she believed respondent was sleeping at the apartment at the time and that she would let the officers in with her key to arrest him.[1] Pet. App. 2-3; R. 3-6, 10, 14, 16, 24, 33, 49-50, 84-85.

The officers accompanied Fischer to the apartment at 3519 South California. One officer secured the rear exits, while the other two went to the front door of the apartment with Fischer. Fischer used her key to let the officers into the apartment; she then returned to the police car. Officers Entress and Gutierrez walked through the living room of the apartment and found respondent sleeping in the bedroom. In the living room, the officers saw narcotics paraphernalia and an open Tupperware jar containing

[1] At the suppression hearing, Officer Entress testified that he asked Fischer whether respondent dealt in narcotics, as Entress had recalled hearing that a person with respondent's name was involved with narcotics. Fischer did not reply. Officer Entress testified that he then said that if Fischer was afraid "of us going into your apartment and locking him up," Fischer should say so and the officers would not go in. After thinking for a moment, Fischer said that she wanted to file a complaint and would open the door for the officers. Pet. App. 4; R. 24, 28.

white powder, which the officers believed was cocaine. In the bedroom, the officers saw two open attache cases containing clear plastic bags filled with white powder and a small amount of marijuana. The officers woke respondent and arrested him. Respondent said that he wanted to get money from a dresser drawer before leaving. In the drawer, the officers saw another clear packet containing white powder. Pet. App. 4-5; R. 13, 17-22, 29-32, 72.

2. Based on the narcotics and paraphernalia found at his apartment, respondent was charged with possession of cocaine with intent to distribute it, and possession of marijuana. Respondent moved to suppress the evidence found at the apartment on the ground that Fischer's consent was ineffective to justify the officers' entry. R. 165-167, 177-178.

a. At the suppression hearing, Officer Entress testified that he believed Fischer had authority to consent to the entry of the apartment, because he thought she lived there. Officer Entress recalled that Fischer said that "all her property was there and that she had been living there."[2] Officer Entress also testified that Fischer "kept using the word 'our' " to refer to the apartment at 3519 South California; at no time did she refer to it as respondent's apartment.[3] Officer Entress added that Fischer had said she had been beaten at the South California apartment. Finally, Officer Entress noted that Fischer had "stated that this

[2] Respondent's counsel sought to impeach Officer Entress with his testimony from the preliminary hearing, where he testified that Fischer had said she "used to" live at the South California apartment. Officer Entress indicated that his best recollection was that Fischer said "she had been living there." R. 11-12; Pet. App. 3. Neither of the courts below made findings regarding Fischer's exact words.

[3] Officer Entress's testimony that Fischer referred to the apartment as "our" apartment was corroborated by her mother. R. 54.

was her key," and that she had used the key to open the apartment door. R. 6, 10, 11, 16-17, 26-28.

Fischer and her mother testified that Fischer had moved into the apartment at 3519 South California with respondent in December 1984. On July 1, 1985, however, respondent had asked her to move out until Fischer's two-year-old child was toilet trained and weaned. With her mother's assistance, Fischer and her children had then moved to her mother's house, leaving her key to 3519 South California at the apartment. Fischer took her clothes with her, but she did not take her other possessions from the apartment; those included her furniture, her stove, her refrigerator, and her dishes. Fischer's mother anticipated that after "the baby was bottle broken and potty trained," Fischer would move back to the apartment. R. 40-46, 71-74.

Between July 1 and July 26, Fischer lived at her mother's house. She visited respondent at the South California Street apartment nearly every day and spent between three and five nights there. However, Fischer neither contributed to the July rent nor invited her friends to the apartment after moving out. Fischer testified that on July 26, after respondent had beaten her and locked her in the apartment, Fischer took the key, without respondent's knowledge, in order to let herself out. Pet. App. 6-8; R. 40-46, 71-74, 79.

b. The trial court granted respondent's motion to suppress. The court rejected the State's argument that the officers could lawfully enter the apartment if they had a reasonable belief that Fischer was authorized to permit them to enter. The court ruled that the State's argument was foreclosed by *People* v. *Miller*, 40 Ill. 2d 154, 238 N.E.2d 407, cert. denied, 393 U.S. 961 (1968), "which would not allow for police to act on the apparent authority of [a] person in allowing the search of an apartment." R. 139.

Applying the test set forth in *United States* v. *Matlock*, 415 U.S. 164 (1974), the trial court also concluded that Fischer did not have actual authority to consent to the entry. The court identified several "controlling factors." These included the fact that Fischer was "not a usual resident, let alone an exclusive resident" at the apartment, but was "a rather infrequent visitor or resident or guest or invitee." Moreover, Fischer was not on the lease, did not pay rent, had moved her clothes, and, "most importantly," had moved her children from the apartment. The court found the evidence about Fischer's possession of the key to be equivocal; Fischer testified at the suppression hearing that she had taken the key, but the court found that that evidence was "negated" by Fischer's testimony at the preliminary hearing that respondent gave the key to her. Balancing those factors, the court concluded that Fischer "did not have the right or control over that apartment to allow the police entry." R. 139-142.

3. The Appellate Court of Illinois, First Judicial District, affirmed. The court noted that even though this case involves a consent to enter rather than a consent to search, the same principles control, because "the validity of a warrantless seizure of evidence in plain view depends on the validity of the entry by the officers seizing the evidence." The court then held that the trial court had properly rejected the State's contention that Fischer's consent was sufficient to justify the entry, because governing Illinois precedents held that warrantless entries and searches may not be upheld on the ground that the consenting party had apparent authority to consent. Pet. App. 8-9 (citing *People* v. *Vought*, 174 Ill. App. 3d 563, 528 N.E.2d 1095 (1988), cert. denied, 109 S. Ct. 3228 (1989), and *People* v. *Bochniak*, 93 Ill. App. 3d 575, 417

N.E.2d 722 (1981), cert. denied, 455 U.S. 938 (1982)).[4]

The appellate court also upheld the trial court's conclusion that Fischer lacked authority to consent to the entry. Reviewing the factors that the trial court found to be controlling on that issue, the court agreed that Fischer "did not have the common authority over the defendant's apartment that was necessary to make her consent valid." Pet. App. 10, 12-14.

4. The Illinois Supreme Court denied a petition for review. Pet. 3.

SUMMARY OF ARGUMENT

1. The Fourth Amendment requires that searches and seizures be reasonable. The question whether a particular law enforcement practice is reasonable is answered by balancing the competing governmental and private interests implicated by the practice. Because criminal investigations necessarily involve weighing and acting on probabilities, this Court has recognized that the law of search and seizure is founded upon the assessment of probabilities in light of the available facts.

Applying those principles, the Court has held that an intrusion that reasonably appears to be justified based on circumstances existing at the time is not rendered invalid because of facts that emerge later. Thus, in *Hill* v. *California*, 401 U.S. 797 (1971), the Court held that an arrest of the wrong person based on a reasonable mistake in

[4] Both *Vought* and *Bochniak* relied on the Illinois Supreme Court's decision in *People* v. *Miller*, 40 Ill. 2d at 159, 238 N.E.2d at 409, where that court applied the Fourth Amendment to suppress evidence found during the search of a guest's car parked in a homeowner's garage; the court held that the apparent authority of the homeowner to consent to the search of the car did not "waive" the guest's constitutional rights.

identity is not an "unreasonable" arrest. And in *Maryland* v. *Garrison*, 480 U.S. 79 (1987), the Court held that a warrant-authorized search of the wrong apartment based on a reasonable factual error about the place to be searched is not an "unreasonable" search.

2. The principles announced in *Hill* and *Garrison* control this case. Under those principles, a search based on consent is justified when it is supported by a reasonable, but mistaken, belief that a consenting party is authorized to consent to the search.

The consent search is a valuable tool of law enforcement that should not be undermined by rules that frustrate its utility. *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 229 (1973). Moreover, a search based on consent does not require an individual "waiver" of a person's Fourth Amendment rights; consent can validly be provided by a third party. *United States* v. *Matlock*, 415 U.S. 164 (1974).

Apparent authority to consent should be held sufficient for three reasons. First, a rule requiring a showing of apparent authority adequately restricts the discretion of law enforcement officers by requiring that they comply with objective, ascertainable rules. See *Delaware* v. *Prouse*, 440 U.S. 648, 654 (1979). Subjective good faith is not enough; the officer's judgment as to the existence of apparent authority must be well founded. Second, retrospective invalidation of consent searches that appear reasonable at the time would impose substantial costs on all consent searches by deterring the police in many instances from acting on consents that appear (and are) perfectly valid. Third, a strict requirement of actual authority exceeds what is required to protect reasonable expectations of privacy. An individual's claim to be free from official invasion is qualified by the need to tolerate the kinds of errors based on reasonable but erroneous judgments that inevitably occur during routine police work.

3. Applying these principles, the entry of respondent's apartment satisfied the Fourth Amendment. The officers reasonably believed that Gail Fischer was authorized to consent to the entry. Fischer explained to the officers that she had been beaten by respondent at their apartment, and she said that she "had been living there." She also stated that all of her belongings were at the apartment. Significantly, she had a key to the apartment, which she told the officers she would use to let them in. Fischer accompanied the officers to the apartment, where she produced the key and used it to open the door. Under these circumstances, there was no objective reason for the officers to question her authority to permit them to enter. Consequently, the evidence found in plain view following the entry of the apartment should not have been suppressed.

ARGUMENT

THE OFFICERS' ENTRY INTO RESPONDENT'S APARTMENT, BASED ON AN APPARENTLY VALID CONSENT BY A THIRD PARTY, WAS LAWFUL

A. A Search That Reasonably Appears Valid At The Time Of The Intrusion Does Not Violate The Fourth Amendment, Even If The Factual Premise For The Search Is Subsequently Found To Be Mistaken

This Court has emphasized that "[t]he essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials, including law enforcement agents, in order 'to safeguard the privacy and security of individuals against arbitrary invasions.' " *Delaware* v. *Prouse*, 440 U.S. 648, 653-654 (1979) (footnote omitted). The requirement of reasonableness in the exercise of discretion does not impose unrealistic restraints upon official conduct, but prohibits only "arbitrary and oppressive interference by enforcement officials." *United*

States v. *Martinez-Fuerte*, 428 U.S. 543, 554 (1976). In each case, the fundamental question is whether the intrusion is reasonable. *Skinner* v. *Railway Labor Executives' Ass'n*, 109 S. Ct. 1402, 1414 (1989); *New Jersey* v. *T.L.O.*, 469 U.S. 325, 340 (1985). It is well established that the reasonableness of a particular practice is determined by "balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *United States* v. *Villamonte-Marquez*, 462 U.S. 579, 588 (1983) (quoting *Delaware* v. *Prouse*, 440 U.S. at 654); *Skinner* v. *Railway Labor Executives' Ass'n*, 109 S. Ct. at 1414.

In a variety of contexts, this Court has made clear that the law of search and seizure is founded upon the assessment of probabilities in light of the available facts. The ascertainment of probable cause, for example, "as the very name implies, * * * deal[s] with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Brinegar* v. *United States*, 338 U.S. 160, 175 (1949); *Illinois* v. *Gates*, 462 U.S. 213, 231-232 (1983). Likewise, the concept of reasonable suspicion "does not deal with hard certainties, but with probabilities." *United States* v. *Sokolow*, 109 S. Ct. 1581, 1585 (1989) (quoting *United States* v. *Cortez*, 449 U.S. 411, 417 (1981)).

As in any decisionmaking process governed by probabilities, there will inevitably be instances of error. The prospect of error in the judgments made by law enforcement officials, however, does not invalidate an intrusion that reasonably appeared to be justified based on circumstances known to the officers at the time of the intrusion. See *Graham* v. *Connor*, 109 S. Ct. 1865, 1872 (1989). This principle underlies the fundamental rule that "[t]he validity of [an] arrest does not depend on whether the suspect

actually committed a crime; the mere fact that the suspect is later acquitted • • • is irrelevant to the validity of the arrest." *Michigan* v. *DeFillippo*, 443 U.S. 31, 36 (1979); see *Gerstein* v. *Pugh*, 420 U.S. 103, 119-123 (1975).

In *Hill* v. *California*, 401 U.S. 797 (1971), the Court applied this principle in upholding an arrest based on mistaken identity. In that case, the police, supported by probable cause, went to Hill's apartment to arrest him. Finding a person fitting Hill's description, they arrested the person and searched the apartment. The arrestee, however, turned out not to be Hill. The Court held that the fact that the police mistakenly arrested the wrong person did not invalidate the subsequent search. The arrest of a person as a result of a reasonable mistake in identity, the Court stated, is still a "reasonable arrest." *Id.* at 802. "[S]ufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment and on the record before us the officers' mistake was understandable and the arrest a reasonable response to the situation facing them at the time." *Id.* at 804. Consequently, "[w]hen judged in accordance with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act, the arrest and subsequent search were reasonable and valid under the Fourth Amendment." *Id.* at 804-805 (citation omitted).

The Court applied the same principle in *Maryland* v. *Garrison*, 480 U.S. 79 (1987). There, the Court held that a search of the wrong apartment, based on a reasonable factual error in conducting a warrant-authorized search, did not violate the Fourth Amendment. The police had obtained a warrant for a suspect's "third floor apartment" and had executed it, reasonably believing that there was only one apartment on the third floor of the building described in the warrant. *Id.* at 80. After beginning the search and discovering narcotics, however, the officers

realized that the third floor was divided into two units and that they were in the wrong apartment. The Court held that the contraband that the officers found in that apartment was not gathered in violation of the Fourth Amendment. The Court first determined that the warrant was not invalid for lack of particularity in describing the "place to be searched," even though in retrospect it was apparent that the warrant was overbroad. The proper test, the Court stated, is to "judge the constitutionality of [the officers'] conduct in light of the information available to them at the time they acted." *Id.* at 85.

Relying on *Hill*'s rationale, the Court in *Garrison* likewise held that the officers' execution of the warrant was reasonable. The Court recognized "the need to allow some latitude for honest mistakes that are made by officers in the dangerous and difficult process of making arrests and executing search warrants," 480 U.S. at 87. In addition, the *Garrison* Court stated that the "objectively understandable and reasonable" mistake that put the officers in the wrong dwelling did not offend the principle of reasonableness that underlies the Fourth Amendment. *Id.* at 88.

B. A Search Based On The Consent Of A Party Who Appears To Have Authority To Give Such Consent Is Valid If The Officers Reasonably Believe That The Consenting Party Has The Proper Authority

The principles announced in *Hill* and *Garrison* justify a consent search based on a reasonable, but mistaken, belief that the consenting party is authorized to permit the search. To begin with, it has long been recognized that the consent search is a valuable means for law enforcement officers to gather information. *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 222 (1973). When a search is supported by consent, neither a warrant nor probable

cause is required. *Id.* at 219. Inasmuch as consent searches "are part of the standard investigatory techniques of law enforcement agencies," the Court has refused to constrain them by "artificial restrictions * * * [that] would jeopardize their basic validity." *Id.* at 229, 231-232.[5]

The Constitution does not require that an individual personally consent to the search of his property before a consent search can be valid. In *United States* v. *Matlock*, 415 U.S. 164 (1974), the Court held that police may conduct a warrantless search of a person's dwelling on the basis of the consent of a third party who has common authority over the dwelling. The Court explained that such consent rests "on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the coinhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched." *Id.* at 171 n.7; see *Frazier* v. *Cupp*, 394 U.S. 731, 740 (1969). *Matlock*, however, explicitly reserved the question whether, absent proof of actual authority, a search is nevertheless justified when "the searching officers reasonably believed that [the third party] had sufficient authority over the premises to consent to the search." 415 U.S. at 177 n.14.

In our view, the reasonable appearance of authority by a third party to consent to a search or an entry provides adequate grounds for the police to act. Several reasons support this view. First, an apparent authority rule

[5] In part to protect the usefulness of consent searches, *Schneckloth* held that a strict "voluntariness" standard, requiring a free and intelligent waiver of a known constitutional right, cf. *Johnson* v. *Zerbst*, 304 U.S. 458 (1938), does not apply to consent searches; instead, a totality-of-the-circumstances test governs the inquiry. 412 U.S. at 235-248.

satisfies the fundamental requirement that the discretion of law enforcement officers be cabined by objective, ascertainable rules. Under the rule we propose, a government agent must have a reasonable basis for believing that a person has authority to consent before acting on such consent. A "subjective good-faith belief" is not sufficient. *Hill*, 401 U.S. at 804. Rather, "the reasonableness standard * * * requires, at a minimum, that the facts upon which an intrusion is based be capable of measurement against 'an objective standard.' " *Delaware* v. *Prouse*, 440 U.S. at 654. As in other Fourth Amendment settings, the question is "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham* v. *Connor*, 109 S. Ct. at 1872. The reasonableness of the officers' action "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Ibid.*

If the police act unreasonably in forming their views, and the consenting person is found to lack proper authority, the search or entry is not valid. To adopt the additional limitation that a search that appeared reasonable at the time must be declared "unreasonable" because of subsequently discovered facts would provide no additional restraint on the exercise of official discretion. A search that reasonably appears to be supported by consent is not "arbitrary" or "oppressive." *United States* v. *Martinez-Fuerte*, 428 U.S. at 554. Consequently, a strict actual authority limitation is not needed to serve the Fourth Amendment's purpose of confining the exercise of discretion by government officials within reasonable bounds. See *Delaware* v. *Prouse*, 440 U.S. at 654.[6]

[6] There is also no reason to believe that the deterrent purposes of the exclusionary rule would be served by applying it to consent

Second, a rule that requires courts to invalidate consent searches that appear reasonable at the time would not be limited in its effects to searches in which actual authority is ultimately found to be absent; it would impose substantial costs on all consent searches. Knowledge that an apparently valid consent can later be invalidated would deter officers from accepting many perfectly legitimate consents, for fear that the searches based on those consents might later be held unlawful and the officers subject to criticism, administrative action, or even damages. Compare *Anderson* v. *Creighton*, 483 U.S. 635 (1987). Police officers facing a seemingly reasonable invitation to search would have to detour from the pursuit of evidence in order to engage in a distracting side inquiry into the exact relationship of the consenting party to the premises to be searched. Moreover, there would be no practicable stopping point to any such investigation, since even a reasonably thorough inquiry might fail to reveal the consenting party's lack of authority.[7]

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searches conducted in reasonable reliance on persons with apparent authority. See *United States* v. *Sledge*, 650 F.2d 1075, 1077 (9th Cir. 1981). However, "[t]he question whether the exclusionary rule's remedy is appropriate in a particular context has long been regarded as an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct." *Illinois* v. *Gates*, 462 U.S. 213, 223 (1983). In our view, the Court should resolve the issue in this case by holding that no unconstitutional police practice has occurred, thereby obviating the need to consider whether the exclusionary rule should be applied in this context. Cf. *United States* v. *Leon*, 468 U.S. 897 (1984); *Illinois* v. *Krull*, 480 U.S. 340 (1987).

[7] As the Seventh Circuit has observed:

> Going beneath the surface of the information in hand * * * would make the outcome of the search depend on niceties of property or marital law far removed from the concerns of the Fourth Amendment. Consents would become untrustworthy unless the police spent additional time investigating the authority of the person who gave consent, which in a case like ours would require knowledge of Illinois domestic relations law and the living arrangements of the couple.

United States v. *Rodriguez*, 888 F.2d 519, 523 (1989).

Rejection of the apparent authority rule would thus impair a practice that is of great use to the efficient conduct of investigations. That result is at odds with the concern expressed in *Schneckloth*, 412 U.S. at 228, not to inhibit consent searches unduly. The impact would be felt not only by the police, but also by "the community [, which] has a real interest in encouraging consent, for the resulting search may yield necessary evidence for the solution and prosecution of crime, evidence that may insure that a wholly innocent person is not wrongly charged with a criminal offense." *Id.* at 243.[8]

Third, while a strict actual authority requirement would strongly protect privacy interests, we believe that the scope of that rule would exceed what is required to protect reasonable expectations of privacy. Cf. *California* v. *Greenwood*, 108 S. Ct. 1625, 1628 (1988) ("An expectation of privacy does not give rise to Fourth Amendment protection * * * unless society is prepared to accept that expectation as objectively reasonable."). We acknowledge, of course, the profound interests in privacy that surround an individual's home and the importance of the home in the

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[8] A critic of the apparent authority rule concedes that the ultimate effect of requiring actual authority regardless of appearances would be that "[t]he only sensible guide for the police is that they should never rely on consent as the basis for a search unless they must. If they do search relying on consent, they should be prepared to meet a heavy burden of proof that consent was in fact meaningfully given. And even then, because of the difficulties of proof, they should expect to be told often that the search was not proper." Weinreb, *Generalities of the Fourth Amendment*, 42 U. Chi. L. Rev. 47, 64 (1974).

hierarchy of values protected by the Fourth Amendment. See, *e.g.*, *Payton* v. *New York*, 445 U.S. 573 (1980); *Steagald* v. *United States*, 451 U.S. 204 (1981); *Welsh* v. *Wisconsin*, 466 U.S. 740 (1984). Nevertheless, the Fourth Amendment was not designed to erect an absolute barrier against entry of a home by officials, or to guarantee error-free police work in making the decision to enter.[9] Its command is one of reasonableness, embodying a compromise between individual security and the legitimate aims of law enforcement. One aspect of this principle, as shown by *Hill* and *Garrison*, is that the police may lawfully act on plausible, reliable information, even though that information is subsequently shown to be wrong. To the extent that freedom from official invasion is safeguarded by the Fourth Amendment, that interest is qualified by the need for tolerance of reasonable mistakes in order to protect the ability of the police to discharge their mission.

In our view, the apparent authority standard properly accommodates competing interests by imposing an objective restraint on official conduct, measured by events facing the officers at the time.[10] The courts of appeals that

[9] Cf. *Brower* v. *County of Inyo*, 109 S. Ct. 1378, 1381 (1989) ("[T]he Fourth Amendment addresses 'misuse of power,' • • • not the accidental effects of otherwise lawful government conduct.").

[10] While we have described the rule as one of "apparent authority," following the usage of the courts of appeals, see, *e.g.*, *United States* v. *Rodriguez*, 888 F.2d at 523, the principles underlying the rule are entirely distinct from the apparent authority doctrine of agency law. See *American Society of Mechanical Engineers, Inc.* v. *Hydrolevel Corp.*, 456 U.S. 556, 565-566 (1982). In agency law, the apparent authority of an agent supports the imposition of liability upon a principal because the agent is in a position to "affect the legal relations of [the principal] by transactions with third persons." *Id.* at 566 n.5 (quoting Restatement (Second) of Agency, § 8 (1957)). In the consent search context, by contrast, the concept of "apparent authority" refers to the reasonable appearance of authority from the vantage point of the officials whose action is being judged. The application of the Fourth Amendment, which "is quintessentially a regulation of the police," Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 371 (1974), does not turn on concepts invoked in state agency law any more than it turns on state property or tort law. See *California* v. *Greenwood*, 108 S. Ct. at 1625; *Dow Chemical Co.* v. *United States*, 476 U.S. 227, 232 (1986); *Matlock*, 415 U.S. at 171 n.7.

have addressed the issue have uniformly adopted that view,[11] as have the vast majority of state courts that have considered the matter.[12]

[11] See, *e.g.*, *United States* v. *Rodriguez*, 888 F.2d at 523 ("The question posed by the Fourth Amendment is whether the search is 'reasonable', and it is reasonable to act on the basis of apparently valid consent."); *United States* v. *Yarbrough*, 852 F.2d 1522 (9th Cir. 1985), cert. denied, 109 S. Ct. 171 (1988); *United States* v. *Miller*, 800 F.2d 129, 133 (7th Cir. 1986); *United States* v. *Hamilton*, 792 F.2d 837, 842 (9th Cir. 1986); *United States* v. *Sledge*, 650 F.2d 1075, 1080-1081 (9th Cir. 1981) (Kennedy, J.) ("[A] search is not invalid where a police officer in good faith relies on what reasonably, if mistakenly, appears to be a third party's authority to consent to the search."); *United States* v. *Isom*, 588 F.2d 858, 861 (2d Cir. 1978); cf. *United States* v. *Peterson*, 524 F.2d 167, 180-181 (4th Cir. 1975) ("At the very least, Mrs. Peterson possessed 'the necessary appearance of authority • • • ' to validate a search based on her consent.". Compare *Riley* v. *Gray*, 674 F.2d 522, 528 n.7 (6th Cir. 1982) (refusing to apply the doctrine based factually implausible claim).

[12] See, *e.g.*, *Nix* v. *State*, 621 P.2d 1347, 1349 (Alaska 1981) ("We now align ourselves with those authorities, representing the majority view, which hold that apparent authority alone is required."); *People* v. *Adams*, 53 N.Y.2d 1, 422 N.E.2d 537, 439 N.Y.S.2d 877, cert. denied, 454 U.S. 854 (1981); 3 W. LaFave, *Search and Seizure*, § 8.3(g), 262-263 n.98 (2d ed. 1987 & Supp. 1989) (collecting cases). See also Model Code of Pre-Arraignment Procedure, § 240.2(1)(c), at 148-149 (1975) ("[t]he consent justifying a search • • • must be given, in the case • • • of (c) search of premises, by a person who by ownership or otherwise, is apparently entitled to determine the giving or withholding of consent."). But see *People* v. *Miller*, *supra*; *State* v. *Carsey*, 59 Or. App. 225, 650 P.2d 987, aff'd, 295 Or. 32, 664 P.2d 1085 (1982).

The apparent authority rule is fully consistent with this Court's decisions in *Stoner* v. *California*, 376 U.S. 483 (1964), and *Chapman* v. *United States*, 365 U.S. 610 (1961). In *Stoner*, the Court held that the police officers' reliance on the authority of a hotel desk clerk to admit them to an absent guest's room was insufficient because "the rights protected by the Fourth Amendment are not to be eroded by strained applications of the law of agency or by unrealistic doctrines of 'apparent authority.' " 376 U.S. at 488.[13] In *Chapman*, the Court held that a search was not valid when a landlord, smelling an "odor of mash" at his tenant's house, called the local police officers and told them they could go inside. 365 U.S. at 611.

Stoner and *Chapman* simply underscore that the police may not rely on persons who plainly lack the indicia of authority to permit the search or entry in question. In neither *Stoner* nor *Chapman* were the police misled about the relationship between the consenting party and the premises to be searched. The police simply accepted consents from persons who could not reasonably be thought to have authority to consent.[14] That factor distinguishes

[13] *Stoner* also stated that only the guest could "waive" his rights with regard to the search, "either directly or through an agent." 376 U.S. at 489. That language does not address the issue in this case. The concept of "waiver" is not the source of authority for a consent search based on the actual authority of a third party, cf. *Schneckloth* v. *Bustamonte*, 412 U.S. at 245 ("a 'waiver' approach to consent searches would be thoroughly inconsistent with our decisions that have approved 'third party consents' "), and it has no relevance to a search justified by a third party's apparent authority. The justification for such a search is the reasonableness of police action based on the information the police have before them.

[14] As one commentator has recognized, in *Stoner* "the police were in no sense mistaken as to the essential facts, namely that the consenting party was only the clerk and that the room was currently rented by the defendant. • • • That is, *Stoner* involved a mistake of law rather than a mistake of fact, which does not come within the apparent authority doctrine." 3 W. LaFave, *Search and Seizure*, § 8.3(g), at 262 & n.96 (2d ed. 1987).

those decisions from cases in which the police make a reasonable mistake of fact about a third party's apparent authority.[15]

C. Under The Foregoing Standards, The Entry Into Respondent's Apartment Was Lawful

The officers who entered respondent's apartment reasonably believed that Gail Fischer was authorized to consent to the entry. As we previously described more fully, Fischer explained to the officers that she had been beaten by respondent at their apartment, and she stated that she had been living there. Fischer repeatedly referred to the apartment as being "ours," and mentioned that all of her belongings were there. Significantly, Fischer had the key to the apartment, which she used to open the door.

These facts were sufficient to justify the officers' conclusion that Fischer had the authority to consent to their entry into the apartment. The situation presented itself to the police as an unfortunate, but routine, domestic dispute; the police accepted the victim's consent to give them access to "her" apartment. There was no reason for the officers to doubt the validity of that consent. Even if the officers had spontaneously probed to discover from Fischer the details of her recent living arrangements, it is far from clear that they would have been able to discover that Fischer lacked the requisite authority to permit the

[15] The Ninth Circuit, which has taken the lead in developing the apparent authority doctrine, has had no difficulty in finding a lack of justification for searches authorized by landlords, *United States* v. *Warner*, 843 F.2d 401, 403 (1988), or hotel managers, *United States* v. *Winsor*, 846 F.2d 1569, 1571 (1988) (en banc), on appropriate facts.

entry.[16] Accordingly, the evidence found in plain view following the entry of the apartment should not have been suppressed.[17]

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[16] The State has urged in its petition (Pet. 27-31) that the appellate court erred in its application of *Matlock* to the facts of this case. There is substantial force to that argument. Compare *United States* v. *Trzaska*, 859 F.2d 1118, 1120 (2d Cir. 1988) (consent was validly given by estranged wife who had only recently moved out, still retained a key to the residence, and still had her personal belongings there), cert. denied, 110 S. Ct. 123 (1989); *United States* v. *Guzman*, 852 F.2d 1117, 1121-1122 (9th Cir. 1988) (consent was validly given by wife whose name was on lease and who sometimes resided at the defendant's apartment and had a key); *United States* v. *Crouthers*, 669 F.2d 635, 642-643 (10th Cir. 1982) (consent was validly given by wife who had moved in with parents but retained key to apartment and had not abandoned marriage). Regardless of whether the courts below erred in their application of *Matlock* (a question that we do not believe need be reached), the closeness of the question strengthens the case for concluding that the officers acted reasonably in reaching their on-the-spot judgment that Fischer's consent was adequate.

[17] Because the Illinois courts have not passed on the application of apparent authority principles to the facts of this case, the Court may wish to remand the case for initial consideration of that issue by those courts. Cf. *United States* v. *Matlock*, 415 U.S. at 177-178.

CONCLUSION

The judgment of the Appellate Court of Illinois, First Judicial District, should be reversed.

Respectfully submitted.

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DECEMBER 1989

☆ U.S. GOVERNMENT PRINTING OFFICE: 1989—262-203/00669